

PATENT NO. 2,300,818
ISSUED: April 13th 2004
FILED: August 31st 1999
PRIORITY: September 15th 1998
FOR: ROTARY MOWER CONDITIONER HAVING IMPROVED
CUT CROP FLOW
OWNER: HAY & FORAGE INDUSTRIES

Canadian Intellectual Property Office
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Dear Sir:

REMARKS OF REQUESTER ON RE-EXAMINATION OF A PATENT UNDER
SECTION 48.1(1) OF THE PATENT ACT

The following remarks are presented by the requestor for re-examination on the above patent and it is requested that these remarks be considered prior to issuance of a decision in the above re-examination process.

General Remarks on Amendments in Claims

It is submitted that each amendment to a claim and the claim as a whole must be subjected to tests on the basis of the following requirements:

1. It is required that claims in a patent be clear and unambiguous.

This is clearly set forth in section 27(4) of the Patent Act and in Rule 84.

No speculation should be necessary to determine what is covered by each claim.

The claim must set out the limits of what is protected. If the claim fails to do this, whether by error or deliberately, the claim must be invalid. The public is entitled to be able to determine by analysis rather than by opinion or guess-work what is the scope and limits of the claim.

Wording should not be so flexible that several interpretations of it are possible, that is, the claim should not have more than one meaning or be capable of both broad and narrow interpretations

From Procter & Gamble Inc. and The Procter & Gamble Company v. Unilever PLC, and Lever Brothers Limited (1995), 61 C.P.R. (3d) 499 (F.C.A. per Stone J.A.):

"In *Natural Colour Kinematograph Co. Ltd. v. Bioschemes Ltd.* (1915), 32 R.P.C. 256 (H.L.), Lord Loreburn, in a well-spoken passage, forcefully condemned ambiguity in a patent claim. In the course of doing so he stated, at page 266:

"It is the duty of the patentee to state clearly and distinctly, either in direct words or by clear and direct reference, the nature and limits of what he claims. If he uses language which, when fairly read, is avoidably obscure or ambiguous, the Patent is invalid, whether the defect be due to design, or to carelessness or to want of skill. Where the invention is difficult to explain, due allowance will, of course, be made for any resulting difficulty in the language. But nothing can excuse the use of ambiguous language when simple language can easily be employed, and the only safe way is for the patentee to do his best to be clear and intelligible. It is necessary to emphasize this warning."

Thus the Patentee must, in pain of invalidity of his patent, avoid language which is obscure and must define the limits of his invention.

2. The claims must be supported by the description. This is clearly specified in Rule 84 wherein it is stated that "the claim shall be clear and concise and shall be fully supported by the description independently of any document referred to in the description".

Thus all characteristics of the embodiment of the invention which are set forth in the claim must be fully set forth in the description.

This rule clearly specifies that the claim must be supported by the description and not merely by an element which may (or may not) be illustrated in the drawings.

It must be noted that the present matter is dealing with a granted patent. There is no possibility for amendment of the description part of a patent in a re-examination process since the re-examination board has no statutory authority for such changes. (See Manual at Paragraph 23.02.07)

Amendments may be made in the specification of a patent application under Section 38.2(1) and (2) to include in the description subject matter which may be reasonably inferred from the patent application as a whole including the description, claims and drawings. However Section 38.2(1) states that this can only occur "before the patent is issued". Thus there is no possibility for the description to be amended after grant in a re-examination process. Thus the above Rule 84 applies to the claims that the claims must be "fully supported by the description independent of any document referred to therein". Thus there is no possibility for the claims to be amended to include

limitations which are (or may be) shown in the drawings but NOT fully supported by the description.

3. The claims must of course be valid relative to the prior art under consideration.

Claims 1, 13 and 25

The patentee has added the following paragraph in each of the above independent claims:

"said upper forward peripheral portion of the conveying roller being disposed in front of the lower forward peripheral portion of the lower conditioning roll".

Thus each of the three independent claims present in the patent now include this additional limitation. This limitation therefore must be carefully considered to see whether it satisfies each of the above three requirements. If it fails any of the three requirements, the claim must be rejected. If the three independent claims are rejected on the ground that the claim is ambiguous under section 27(4) or that the claim is not properly supported by the description under rule 84, then each and every one of the dependent claims, which necessarily contain the same limitations, must also be rejected.

Turning therefore to the three requirements set forth above.

Not supported by the description

On page 2 in the third paragraph of their remarks the patentees simply state that "support for this amendment may be found for example on page 12, lines 7 to 27 and with reference to Figures 6 and 7. There is no analysis of exactly what is

claimed in this feature relative to exactly what is disclosed in the description. The reference to Figures 6 and 7 is of course improper since it is inconsistent with Rule 84 which requires that the claimed feature be fully supported by the description.

Turning therefore to a proper analysis of exactly what is disclosed in the description, reference is made to the attached Figure A which has been developed with reference only to the description.

Thus on page 10 at line 9 is disclosed the stacked conditioning rolls 170 and 172.

At page 10 line 15 is disclosed a nip 174. In lines 17 to 20 is disclosed that the nip 174 is spaced upwardly and rearwardly from the generally planar cutting zone defined by the knives. It should be noted that there is no specificity with regard to the distance of rearward displacement nor the distance of upward displacement.

At page 11 lines 7 to 12 is provided further explanation of the problem and the statement that the conditioning rolls have been moved rearwardly with respect to their traditional location. However this again does not provide any specificity as to the distance.

On page 11 in the paragraph from line 13 to 25 is provided a description of the construction of the roller 186 and the statement that roller 186 is generally between the cutter bed and the lower conditioning roller 172. Nothing further is stated about its location. Turning now to page 12 at line 7 is stated that the conveying roller 186 presents a diameter that is less than the diameter of each of the conditioning rolls 170 and 172. This does not state any location of the rollers.

At page 12 lines 12 through 16 is stated the following

"The rotational axis of the conveying roller 186 is spaced below the rotational axis of the lower conditioning roll 172 and is generally vertically aligned with the planer (sic) cutting zone defined by the knives 74. Thus the upper front quadrant of the conveying roller 186 presents an upwardly and rearwardly moving surface extending between the cutter bed 66 and the nip 174.

These sentences merely state that the axis, indicated in Figure A at axis A, of the roller 186 is below axis B of the roller 172. The second sentence defines an upper front quadrant marked on Figure A of the roller 186 and states that it presents an upwardly and rearwardly moving surface extending between the cutter bed 66 and the nip 174. This quadrant is marked at "quadrant" in Figure A and it is shown generally extending between the cutter bed 66 and the nip 174.

Further description is presented in lines 17 through 27. This description specifies

- a) the roller 186 lifts the crop upwardly and rearwardly to the nip.
- b) the crop material is not required to turn sharp angles but rather rises gently and gradually.
- c) the relatively small and low conveying roller 186 helps the crop material to move up and through the conditioning rolls.

These conditions are marked on figure A by the path or arrow 203.

It will be noted therefore that the description is entirely silent as to the height of the bottom conditioning roll 172 relative to the guide roller 186 and in relation to the position of the quadrant of the roller 186 relative to any part of the bottom

conditioning roller 172. Thus the arrangement illustrated in Figure A attached hereto is entirely consistent with the complete description of the patent.

There is no support in the description therefore for the above quoted limitation that the quadrant is in front of the lower forward peripheral portion of the lower conditioning roller 172.

Ambiguity of the claim under Section 27.4 and Rule 84

It is submitted that the term "in front of" has at least three potential meanings and it is not clear which of those meanings apply in relation to the stated limitation so that the claim must be rejected that it is ambiguous.

a) That the element A is merely in advance of the element B. Thus for example it is proper to say that "the winner of the 100 meter race was at least 10 yards in front of the second place finisher. This is so even though there is no alignment whatsoever between the winner and second place finisher.

b) That the element A is partly aligned with element B. Thus for example the dead man is unlikely to argue that he was not in front of the window, when the bullet came through, because only his head was above the window sill.

c) Element A wholly covers element B. Thus it is proper to say "place the screen in front of the window so that persons outside cannot see into the room".

As the claim has all of the above potential meanings, none of which are clarified by the description, it must be rejected as ambiguous.

Invalidity in view of the Prior art of Savoie

Attached as Figure B is an enlarged view of a part of Figure 10 of Savoie on which is marked those items which correspond to the conditioning rollers 170 and

172 together with the nip 174. Also is marked the cutting zone generally indicated at 66. Also is marked the conveying roller 186. The conveying roller has a quadrant which is marked as such on Figure B and commences of course at a plane A which passes through the axis A of the roller 186. This quadrant terminates at a position vertically aligned with the axis A. Also is marked the forward lower portion of the lower roller 172 which is marked at lower portion and extends from a line in plane B which is aligned with the axis B of the roller 172 and extends to a bottom position which is vertically aligned with axis B.

As set forth above, therefore, based upon the first of the available interpretations of the meaning of the words "in front of", the roller 186 is clearly in advance of the conditioning roll 172 bearing in mind movement of the construction in the direction toward the left in Figure B. In addition careful comparison of the quadrant in relation to the lower portion will show that a part of the quadrant is located in alignment with a part of the lower portion. Thus, even in accordance with the second interpretation of the term "in front of", Savoie anticipates this feature. As set forth hereinbefore, there is no basis in the description for an interpretation of the words "in front of" to mean that the whole of the quadrant is directly aligned with the whole of the lower portion. This cannot therefore be a proper interpretation of the words "in front of".

Thus it is clear that Savoie anticipates any proper interpretation of the feature now added into Claims 1, 13 and 25. Thus these claims remain anticipated by the prior art of Savoie.

Dependent Claims 2, 14 and 35

These claims now add the limitations that

"most of the lower forward peripheral portion of the conveying roller is disposed below the plane of the cutting zone and most of the lower forward peripheral portion of the conditioning roll is disposed above the plane of the cutting zone."

Not supported by the description

This definition is clearly not supported in the description. The description has been carefully analyzed above. The only reference in the description to the location of the conveying roller is that its axis is "generally vertically aligned with the planer (sic) cutting zone defined by the knives 74."

Claim 2 is dependent upon claim 1 and has the above definition. Claim 12 is also dependent upon Claim 1 and specifies that the axis is "generally vertically aligned with the plane of the cutting zone".

Claim 2 must therefore be rejected since either it is identical to the meaning of Claim 12 and is thus redundant; or Claim 2 it has a different meaning from Claim 12 and the description, in which case it has no basis in the description. (It is well established in the tenets of interpretation that two claims of a patent cannot have the same meaning). Thus Claim 2 should be rejected on the basis that there is no support in the description for this definition. The same analysis of course applies to Claims 14 and 35.

Ambiguity of the claim under Section 27.4 and Rule 84

Yet further, these claims are unclear for the following reasons

- a) The specific location of the "generally planar cutting zone" is not properly defined. The term "zone" is potentially imprecise and may indicate some

variability in height. Thus it follows that an analysis of whether most of an element is above or below a zone is variable and fails to satisfy the requirements of Section 27.4 and Rule 84.

- b) the term "most" is imprecise.

Invalidity in view of the Prior art of Savoie

The specific location of the axis of the roller and thus the proportions of the roller which are above and below the cutting zone is merely a matter of obvious adjustment of the construction of Savoie as discussed in more detail hereinafter.

Claims 8 and 20

These claims add that

"Said conveying roller comprising a single roller, unaccompanied by an upper roller forming a nip therewith."

It is submitted that this amended claim should be rejected because there is simply no basis in the description supporting this added feature. The description is entirely silent about the presence or absence of an upper roller. It is well established that simple silence concerning a feature is not equivalent to a positive statement that that the feature is omitted. The description is of course silent about many features of the device including specific frame components, wheels and features of the hitch. Clearly the silence about these features does not indicate that they are absent.

It is well established in Canadian practice that negative limitations are improper.

Claims 10, 22 and 32

These claims have been amended so as to change the definition of the diameter. The amended definition states that it is the outermost diameter of the conveying roller that is smaller than the outermost diameter of the lower conditioning roll.

The diameter of a roller carrying ribs or flutes, as one or both of these rollers may do, is not clear. The diameter of such a roller may be the outermost diameter to the tips of the ribs, the innemost diameter to the peripheral surface of the metal cylinder forming the roller, or it may even comprise a midpoint between these two diameters.

The original definition of claim 10 is unclear and ambiguous. The new definition introduced by the amendment must be supported by the description or it should be rejected.

The description at page 12 lines 7 and 8 merely states that

"The conveying roller 186 presents a diameter that is less than the diameter of each of the conditioning rolls 170 and 172."

The description does not make clear which diameter is considered. Therefore an amendment presented at this time which selects one of the possible options is not and cannot be supported by the description and therefore the amendment must be rejected.

Claims 11, 12, 23, 24 , 33 and 34.

Claim 12 originally stated

"Said cutting zone being substantially planar and generally vertically aligned with the conveying roller axis."

Claim 12 as amended states

"Said conveying roller being rotatable about a conveying roller axis that is generally vertically aligned with the plane of said cutting zone."

Either these two statements have the same meaning, in which case the amendment should be rejected as redundant, or they have a different meaning in which case the new definition should only be accepted if it is fully supported by the description.

Not supported by the description

The description at page 12 lines 12 to 14 specifically states

"The rotational axis of the conveying roller 186 is generally vertically aligned with the planer(sic) cutting zone defined by the knives 74."

It is submitted that the only definition that has proper support in the description is exactly the above words. Any other words may or do have a different meaning. While in some patent matters, the alignment of one element with another may be of a minor matter and thus may be defined imprecisely. In the present matter the definition of the location of the axis of the conveying roller relative to the cutting zone is of paramount importance in comparison with the prior art of Savoie.

It should not be a matter of speculation as to whether or not these words mean the same as the words in the description. If they mean the same then the same words should be used. If they mean something different then they are not supported.

It is submitted therefore that the new definition is different from the description of this feature and thus is not supported and should be rejected.

Ambiguity of the claim under Section 27.4 and Rule 84

The axis of the conveying roller is clear and has no doubt.

However, the term "generally vertically aligned" does not provide the required specificity of the claim to satisfy the requirements of the Act and Rules.

This lack of clarity in the claim is compounded by the use of the term "cutting zone". This term is also undefined.

In order to assess the scope of this claim, therefore, the reader must attempt to determine where is the zone and how large is that zone and secondly what is meant by the term "generally vertically aligned".

It is submitted that the Patentee, particularly at the point of an alleged invention, is obligated to specify what is within the scope and what is outside the scope. If the patentee fails to do so then the claim must be invalid. The patentee could have, in the description and in the claims, specified distances concerned by numerical values. Such a definition would bring clarity to the matter and would enable a reader to determine the scope of protection. In the absence of such definition, the claim should be rejected as ambiguous and failing to define the invention.

The purpose of claims in a patent is to provide certainty to the reader. In the situation herein as presented by the patentee, where the scope of protection is merely based upon a matter of opinion then the claim must necessarily be rejected.

It is well established that terms such as "generally", "approximately", "about" are unacceptable terms since they do not provide the necessary specificity of definition. This is particularly applicable where the lack of specificity occurs at the heart of the invention. It is further submitted that these claims should be rejected on the ground that they do not provide the necessary specificity of the claims at the heart of the invention.

Invalidity in view of the Prior art of Savoie

Finally it is submitted that the prior art of Savoie discloses this feature or at least renders the feature merely obvious.

In this regard, the patentee argues that the conveying roller 186 (roller 31) of Savoie does not carry out the same function as that in the present patent.

Referring again to Figure B presented herein, on which the reference numerals from the present patent have been added to Figure 10 of Savoie for convenience of review, it is clear that Savoie discloses a conveying roller 186 which has an upwardly and rearwardly moving portion at least partly in front of a lower portion of the bottom roll 172.

The question as to whether the axis A is generally aligned with the cutting zone suffers from the above problems of failure of the patentee to properly define the invention.

It is submitted that, if one wishes to compare the function of the conveying rollers 186, then it is necessary to review the actual patent documents rather than to analyze the matter based upon speculation as to how the device might operate as set forth in the argument of the patentee.

In the patent is stated that, as a result of the location of the axis of the conditioning roll, "*the upper front quadrant of the conveying roller 186 presents an upwardly and rearwardly moving surface extending between the cutter bed 66 and the nip 174.*"

At lines 22 and 23 on page 12 is stated

"That is to say, the relatively small and low conveying roller 186 "helps" the crop material move up and through the conditioning rolls 170 and 172."

Savoie states at page 10 lines 16 through 18

"The heavily ribbed feeding roller 31 at the bottom is used to pull the freshly mowed forage upwards and to feed it through the macerating rolls."

In otherwords Savoie states that the feeding roller 31 (roller 186) is at the bottom. Thus Savoie states that the roll pulls the crop material upwards to feed it through the rolls.

It is submitted that these explanations as to the operation of the devices, which are the only explanations of the function, are substantially identical.

It is submitted therefore that the function of the roller 31 of Savoie is identical to the function of the roller 186 of the present patent so that any differences as to the specific geometry are trivial or are merely a matter of small or minor adjustment well within the skill of a person skilled in this art reviewing the two documents.

In other words the roller 31 (186) of Savoie is at the bottom and pulls the crop upwardly. This specific height of the roller can of course be adjusted by a person skilled in this art, without the necessity of inventive contribution, within this functional statement.

CONCLUSION

It is submitted therefore that the amended claims presented by the patentee should be rejected on the grounds that they are unsupported by the description under Rule 84, that the claims are unclear and introduce ambiguity as is unacceptable under Section 27(4) and rule 84, and that the claims do not properly

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distinguish from the prior art submitted herein which is the subject of this re-examination.

Respectfully submitted

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Enc.(2)

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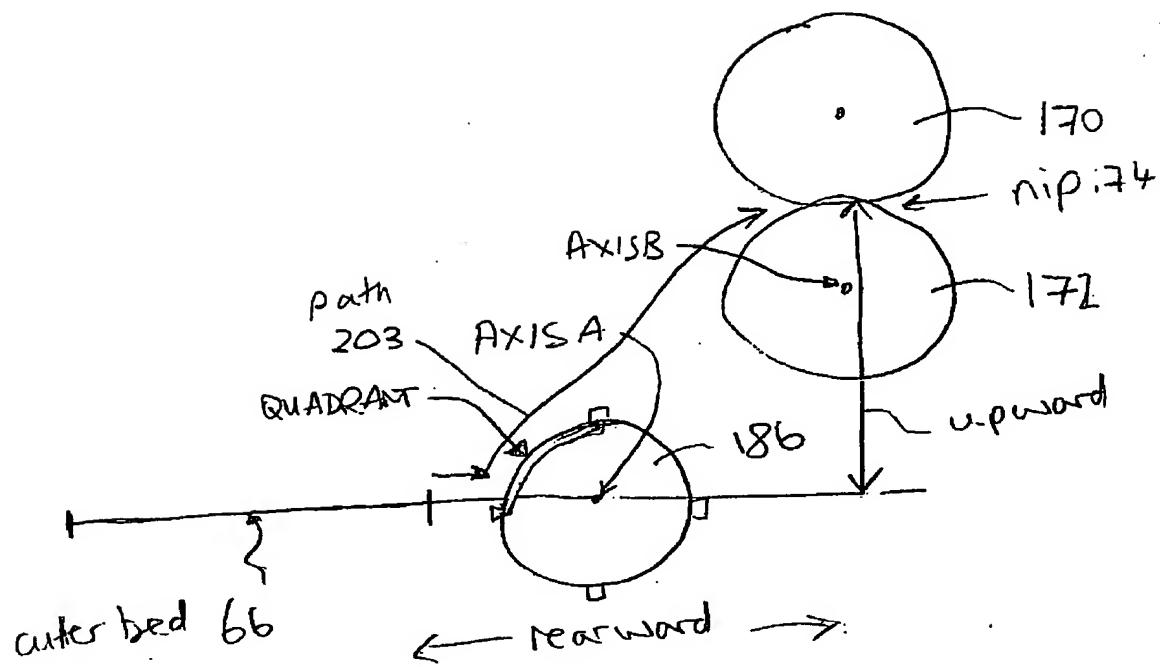


Fig A

Fig. B

